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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ANDREA WOODEN, Plaintiff and Appellant, v. SHARON WOODEN, et al., Defendants and Respondents.	B266851 (Los Angeles County Super. Ct. No. BC476652)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara Meiers, Judge. Affirmed as to Issac Richard III; dismissed as to Sharon Wooden.

ORIGINAL PROCEEDINGS in mandate. Petition by Andrea Wooden denied.

Andrea Wooden, in pro. per., for Plaintiff and Appellant.

Sharon Wooden, in pro. per., for Defendants and Respondents.

INTRODUCTION

This litigation arises from a family dispute over an apartment building that three sisters inherited from their mother. One of the sisters, Andrea Wooden, lived in the building, but one of the other sisters, Sharon Wooden, claimed Andrea did not pay rent. Andrea alleges that Sharon and Sharon's son, Isaac Richard III (Tre), wrongfully removed her personal property from her apartment.[1] After years of litigation, the trial court on September 14, 2015 sustained a demurrer by Sharon and Tre to Andrea's second amended complaint for conversion without leave to amend. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Andrea, representing herself, sued Sharon, Tre, and other individuals, asserting 12 causes of action. Andrea claimed that Sharon and Tre entered her apartment without permission and wrongfully removed her personal property. After Sharon and Tre failed to respond to the first amended complaint, the trial court entered their defaults and subsequently entered default judgments against them. Sharon and Tre moved to vacate the defaults and the default judgments. The trial court denied their

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[1] Because Andrea and Sharon have the same last name, for convenience and clarity we refer to Andrea and Sharon by their first names. (See *Farmers New World Life Ins. Co. v. Rees* (2013) 219 Cal.App.4th 307, 310, fn. 1.) We refer to Isaac Richard III by his family nickname Tre to distinguish him from his father, who is also a party to this litigation, although not to this appeal.

motions, and they appealed. We reversed the order denying their motions to vacate the defaults and default judgments. (*Wooden v. Wooden* (Sept. 22, 2014, B251358) [nonpub. opn.].)

On remand, Sharon and Tre demurred to all 12 causes of action in Andrea's first amended complaint. The court sustained the demurrer to all causes of action without leave to amend, except the demurrer to the conversion cause of action, which the court sustained with leave to amend. In her conversion claim Andrea alleged that Sharon and Tre had removed her belongings from one of the two apartments she occupied in the building and that her property was either stolen or thrown into a container as trash. In sustaining the demurrer to this cause of action with leave to amend, the court stated that Andrea needed to "present more specific facts about what [property] she did and did not get back and the values thereof, plus additional facts to support her claims as to [Tre]."

Andrea filed a second amended complaint alleging one cause of action for conversion. Sharon and Tre demurred again. On September 14, 2015 the court sustained their demurrer without leave to amend, ruling that there was "no evidence or facts alleged which show either possession by [Sharon and Tre] or, more importantly, an intent to permanently deprive [Andrea] of her property, the Second Amended Complaint itself alleging that [Andrea] found her personal property in a container and was 'attempting to recover it' when the police came, indicating availability and accessibility for [Andrea] as to the property [at] issue." On September 14, 2015 Andrea timely appealed from the

court's dismissal of the conversion claim.[2] She did not appeal from the dismissal of the other eleven claims the court had previously dismissed.

DISCUSSION

A. *Appealability*

The record includes a reference to a pending cross-complaint by Sharon and the third sister, Charlene Kobrine, against Andrea and another individual, Carol Mason. Although there is a signed order dismissing Andrea's complaint, there is no final judgment between Andrea and Sharon because Sharon's cross-complaint against Andrea has not been adjudicated. Thus, the order dismissing Andrea's complaint is not appealable under the final judgment rule. (See *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, 1101 ["the one final judgment rule . . . precludes an appeal from a judgment disposing of fewer than all the causes of action extant between the parties, even if the remaining causes of action have been severed for trial from those decided by the judgment"]; *Westamerica Bank v. MBG Industries, Inc.* (2007) 158 Cal.App.4th 109, 132 ["a judgment which resolves a

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[2] The court signed and entered the order of dismissal on January 5, 2016. Andrea filed and served a notice of entry of dismissal on January 7, 2016. Although Andrea filed this appeal before entry of the signed order of dismissal, we exercise our discretion to entertain the premature appeal. (See *Los Altos Golf and Country Club v. County of Santa Clara* (2008) 165 Cal.App.4th 198, 202 ["[b]ecause a judgment of dismissal has actually been entered, we will liberally construe the appeal to have been taken from the judgment of dismissal"]; Cal. Rules of Court, rule 8.104(d).)

complaint but does not resolve a cross-complaint pending between the same parties, is not final and not appealable, even if the complaint has been fully adjudicated"]; *American Alternative Energy Partners II v. Windridge, Inc.* (1996) 42 Cal.App.4th 551, 557 ["[w]hen a cross-complaint remains pending between the parties, even though the complaint has been fully adjudicated, there is no final judgment"]; *California Dental Assn. v. California Dental Hygienists' Assn.* (1990) 222 Cal.App.3d 49, 59 ["[a]though an order of dismissal following sustaining of a demurrer without leave to amend" is appealable, "only *final* judgments are appealable," and there is no "final judgment with respect to parties as to whom a cross-complaint remains pending"].)

The dismissal of Andrea's complaint is a final judgment, however, with respect to Tre, who is not a party to the cross-complaint, because the dismissal resolves all claims between Andrea and Tre. Therefore, the order dismissing Andrea's complaint against Tre is appealable. Hearing Andrea's appeal from the order dismissing her complaint against Tre but delaying consideration of Andrea's appeal from the order dismissing her complaint against Sharon, however, would "further the very fragmentation and multiplicity of appeals that the final judgment rule seeks to avoid." (*California Dental Assn. v. California Dental Hygienists' Assn.*, *supra*, 222 Cal.App.3d at p. 60.) Therefore, although Andrea's appeal from the order sustaining Sharon's demurrer is "jurisdictionally defective," we will treat it as a petition for writ of mandate and decide it with Andrea's appeal from the order sustaining Tre's demurrer. (*Ibid.*; see *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 745-746 [treating a nonappealable order as a petition for writ of

mandate even though the order did not dispose of all causes of action between the parties].)

B. *Standard of Review*

"We perform an independent review of a ruling on a demurrer and decide de novo whether the challenged pleading states facts sufficient to constitute a cause of action." (*Popescu v. Apple Inc*. (2016) 1 Cal.App.5th 39, 50.) "'While the decision to sustain or overrule a demurrer is a legal ruling subject to de novo review on appeal, the granting of leave to amend involves an exercise of the trial court's discretion. [Citations.] When the trial court sustains a demurrer without leave to amend, we must also consider whether the complaint might state a cause of action if a defect could reasonably be cured by amendment. If the defect can be cured, then the judgment of dismissal must be reversed to allow the plaintiff an opportunity to do so. The plaintiff bears the burden of demonstrating a reasonable possibility to cure any defect by amendment. [Citations.] A trial court abuses its discretion if it sustains a demurrer without leave to amend when the plaintiff shows a reasonable possibility to cure any defect by amendment. [Citations.] If the plaintiff cannot show an abuse of discretion, the trial court's order sustaining the demurrer without leave to amend must be affirmed.'" (*Green Valley Landowners Association v. City of Vallejo* (2015) 241 Cal.App.4th 425, 432.)

C. *The Trial Court Properly Sustained the Demurrer to the Conversion Claim Without Leave To Amend*

The trial court properly ruled that the allegations of Andrea's complaint did not state a claim for conversion. """Conversion is the wrongful exercise of dominion over the

property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. . . ."'" (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240.) "'To establish a conversion, it is incumbent upon the plaintiff to show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of the property.' [Citation.] 'The act of removing personal property from one place to another, without an assertion of ownership or preventing the owner from exercising all rights of ownership in such personal property, is not enough to constitute conversion.'" (*Spates v. Dameron Hospital Assn.* (2003) 114 Cal.App.4th 208, 222; see *Simonian v. Patterson* (1994) 27 Cal.App.4th 773, 781 [defendant's act of moving items out of an apartment his daughter shared with her ex-boyfriend, including record albums and Christmas decorations, was not a conversion of the ex-boyfriend's property because the defendant did not have possession of the items and he derived no personal gain from their transfer].)

Andrea alleged that on February 25, 2011 she arrived at her apartment and discovered the locks had been changed and her personal property had been removed. She further alleged that she "discovered most of her personal property that had been removed from her home . . . in a container parked in front of the building," and she "was attempting to recover her personal property when three LAPD officers arrived . . . ." Andrea did not allege what ultimately happened to her property, but the reasonable inference of her allegations is that she recovered, or had the opportunity to recover, her personal property. As the trial court correctly noted, Andrea's allegations did not state a

claim for conversion because they indicate Andrea recovered or could have recovered the personal property she claims Sharon and Tre moved from the apartment, and because Andrea did not allege Sharon or Tre ever claimed or intended to claim they owned the property. (See *Spates v. Dameron Hospital Assn., supra,* 114 Cal.App.4th at p. 222.)

Andrea argues that the trial court erred in sustaining the demurrer because the court weighed the truthfulness of her allegations instead of determining their legal sufficiency. Andrea is incorrect. Sharon and Tre argued that the second amended complaint was a sham pleading because it contradicted the allegations of Andrea's prior complaint.[3] The court, however, did not base its ruling on the "sham pleading" argument. As noted, the court concluded that Andrea's allegations did not state a claim for conversion because she had not alleged that Sharon and Tre took possession of her personal property or intended to deprive Andrea of her ownership rights in the property.

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3 When an amended complaint attempts to avoid the defects of a prior complaint by ignoring them, the court may examine the prior complaint to ascertain whether the amended complaint is a "sham." (*Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 343-344.) If the plaintiff fails to explain the new complaint's inconsistencies with a prior complaint, the court may disregard the inconsistent allegations and is not ""bound to accept as true allegations contrary to factual allegations in former pleading in the same case."" (*Ibid.*)

Andrea also argues that, pursuant to Code of Civil Procedure[4] section 430.41, subdivision (b),[5] the court should not have allowed Sharon and Tre to demur to the conversion cause of action because they had already demurred to it in their prior demurrer to Andrea's previous complaint. Section 430.41, subdivision (b), provides: "A party demurring to a pleading that has been amended after a demurrer to an earlier version of the pleading was sustained shall not demur to any portion of the amended complaint, cross-complaint, or answer on grounds that could have been raised by demurrer to the earlier version of the complaint, cross-complaint, or answer." Because section 430.41, subdivision (b), did not become effective until January 1, 2016, however, it did not apply to the demurrer Sharon and Tre filed on August 12, 2015 and the court sustained on September 14, 2015. (See § 430.41, subd. (b); § 3 ["no part of [the Code of Civil Procedure] is retroactive, unless expressly so declared"].) The law prior to the enactment of section 430.41, subdivision (b), did not preclude the court from hearing the demurrer by Sharon and Tre to the conversion cause of action in Andrea's second amended complaint. (See *Carlton v. Dr. Pepper Snapple Group, Inc.* (2014) 228 Cal.App.4th 1200, 1211 ["'party is within its rights to successively demur to a cause of action in an amended pleading notwithstanding a prior unsuccessful demurrer to that same cause of action'"]; *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1035 ["when a plaintiff files an amended

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4 Statutory references are to the Code of Civil Procedure.

5 Andrea cites in her opening brief to "430.41(4)(b)." Because there is no such statute, we assume she is referring to section 430.41, subdivision (b).

pleading in response to an order sustaining a prior demurrer to a cause of action with leave to amend, the amended cause of action is treated as a new pleading and a defendant is free to respond to it by demurrer on any ground"].)

Moreover, even if section 430.41, subdivision (b), had applied to the demurrer by Sharon and Tre, the new statute would not have barred their demurrer to the conversion cause of action in Andrea's second amended complaint because they demurred on a ground they could not have raised in a prior demurrer. Section 430.41, subdivision (b), currently allows a party to demur again to the same cause of action where the plaintiff, as Andrea did here, amends the cause of action to include new allegations. (See § 430.41, subd. (b) [party demurring to an amended complaint "shall not demur to any portion of the amended complaint . . . *on grounds that could have been raised* by demurrer to the earlier version of the complaint," italics added]; see generally Assem. Com. on Judiciary, com. on Sen. Bill No. 383, as amended July 9, 2015 (2015-2016 Reg. Sess.) July 14, 2015 [stating that the bill that became section 430.41 "would prohibit a demurring party from demurring again to the same cause of action, unless the cause of action itself is amended," and explaining that "when demurring to a pleading amended after a demurrer has been ruled on, the bill would not allow a party to demur to causes of action . . . that were not amended, and would not allow a party to raise any issue which could have been raised earlier"].)

As noted, in ruling on the demurrer to the first amended complaint, the court instructed Andrea to allege more specific facts about what personal property she recovered, what personal property she did not recover, and the value of the property. In

response, Andrea added to her second amended complaint a long list of allegedly missing items of personal property and a statement that she discovered most of her property in a container parked in front of the building. Andrea had previously alleged Sharon and Tre rented a container and threw her belongings into it as trash; she did not previously allege she could have recovered the property. Sharon and Tre had the right, even under section 430.41, subdivision (b), to demur to Andrea's amended conversion cause of action on the new grounds that the new claim was a "sham" and that it still did not state a claim for conversion.

Finally, Andrea argues that the trial court should have given her leave to amend her conversion cause of action. We review the trial court's ruling for abuse of discretion. (See *Boxer v. City of Beverly Hills* (2016) 246 Cal.App.4th 1212, 1217; *Green Valley Landowners Association v. City of Vallejo, supra,* 241 Cal.App.4th at p. 432.) On appeal, a plaintiff ""'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' [Citation.] . . . The plaintiff must clearly and specifically set forth . . . factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary."'" (*Green Valley Landowners Association*, at p. 432.)

Andrea states without elaboration, a showing, or further argument that the "the trial court should have allowed [her] the opportunity to cure the complaint." Because Andrea has not met her burden to state what additional facts she would allege to support her conversion claim, or any other claim, the trial court did not abuse its discretion in sustaining the demurrer by Sharon and Tre without leave to amend.

DISPOSITION

With respect to Tre, the judgment is affirmed. With respect to Sharon, the appeal is dismissed. Treating the appeal with respect to Sharon as a petition for writ of mandate, the petition is denied. Sharon and Tre are to recover their costs in these proceedings.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.